Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-955

DeHAVILLAND AIRCRAFT OF CANADA, LTD.,

Petitioner,

vs.

SAMUEL J. BETAR, Public Administrator of Cook County (Illinois) and Administrator of the Estate of RAGHUBIR DUTT LAW, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DeHAVILLAND AIRCRAFT OF CANADA, LTD.,

Petitioner,

VS.

SAMUEL J. BETAR, Public Administrator of Cook County (Illinois) and Administrator of the Estate of RAGHUBIR DUTT LAW, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, DeHavilland Aircraft of Canada, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit reversing the District Court judgment and ordering the cause remanded to Illinois state court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 603 F. 2d 30 (7th Cir. 1979), and is appended hereto (App. 5a-13a). The opinion of the United States District Court for the Northern District of Illinois, which was reversed by the Court of Appeals, is reported at 80 F.R.D. 400 (N.D. Ill. 1977), and is appended hereto (App. 1a-4a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 8, 1979. A timely Petition for Rehearing En Banc was denied on September 20, 1979 (App. 15a), and this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is this Court's holding in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931)—that diversity jurisdiction is determined by the citizenship of plaintiff administrator charged with the responsibility for bringing a wrongful death action (284 U.S. at 186)—still the law?

2. Should the provisions of 28 U.S.C. § 1359, precluding collusive attempts "to invoke" federal jurisdiction, be applied to remand a case where the administrator's appointment was concededly *not* made for purposes of invoking federal jurisdiction?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * *

§ 1359 Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Illinois Revised Statutes, Chapter 70:

§ 2 Plaintiffs in action—Beneficiaries—Amount of damages—Distribution—Limitation of actions—Next of Kin—Contributory negligence

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered and in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person. . . .

Illinois Revised Statutes, Chapter 3:

§ 164 Bond

Before entering upon the duties of his office, every public administrator shall enter into a bond payable to the People of the State of Illinois in a sum not less than Five Thousand Dollars with surety as provided by this Act and approved by the Court of the county in which he is appointed and conditioned that he will faithfully discharge all the duties of his office. . . .

§ 166 Protection of Estates by Public Administrator

. . . When letters of administration are issued to the public administrator, he shall have the same powers and duties as other administrators appointed under this Act until he is discharged or his authority is sooner terminated by order of Court.

Illinois Revised Statutes, Chapter 110½:

§ 13-2 Bond and Oath

Before entering upon the performance of his duties, every public administrator and every public guardian and conservator shall take and file in the Court an oath or affirmation that he will support the Constitution of the United States and the Constitution of the State of Illinois and will faithfully discharge the duties of his office and shall enter into a bond payable to the People of the State of Illinois in a sum of not less than $5,000 with security as provided by this Act and approved by the Court of the county in which he is appointed, conditioned that he will faithfully discharge the duties of his office.

§ 22-3 Right to sue

If no letters are issued in this State upon the Estate of a nonresident decedent or ward, a representative to whom letters are issued on the Estate of competent jurisdiction of any other state, territory, country or the District of Columbia may sue in this State in any case in which a resident representative may sue. The Court in which the suit is filed may order the nonresident representative to give bond for costs as in the case of the nonresident.

STATEMENT OF THE CASE

Aircraft Accident In Africa—Indian Citizen Killed

This case arises out of an airplane crash in Zambia, Central Africa resulting in the death of Raghubir Dutt Law, a citizen of New Delhi, India. Law's surviving widow, Urmila Law, and his four children are likewise Indian nationals.

The airplane involved in the crash, a Twin Otter, was manufactured in Canada by the petitioner, DeHavilland Aircraft of Canada, Ltd., a Canadian corporation. The plane had allegedly been transported to Lusaka, Zambia by an agent of petitioner for a demonstration to the Zambian Air Force of which decedent was a member. It is further alleged that during a demonstration flight, the plane crashed causing decedent's fatal injuries. There was no allegation or contention that either the decedent, his widow or children, or the airplane were ever in Illinois for any purpose.

Appointment Of Illinois Administrator—Suit Filed In Illinois

On April 27, 1977, an Order was entered by the Circuit Court of Cook County (Illinois), Probate Division, appointing Samuel J. Betar, Public Administrator of Cook County, as the duly appointed administrator for the Estate of Raghubir Dutt Law, deceased. On April 28, 1977, Samuel J. Betar, as administrator of the Estate of Raghubir Dutt Law, filed an action in the Circuit Court of Cook County against petitioner and DeHavilland Canada, Inc., an Illinois corporation and a subsidiary of petitioner.

Removal To District Court—Dismissal Order

On May 27, 1977, defendants removed the case to the United States District Court for the Northern District of Illinois, Eastern Division. Jurisdiction was asserted under 28 U.S.C. § 1332(a)(2) conferring original federal jurisdiction on district courts in actions between citizens of a state and citizens of a foreign state. Defendants also moved to dismiss DeHavilland Canada, Inc. as a "sham" defendant and further moved to dismiss the entire case for lack of personal jurisdiction over DeHavilland Canada, Ltd. Thereafter, the Illinois corporation, DeHavilland Canada, Inc., was voluntarily dismissed from the case and plaintiff administrator filed a motion to remand.

On October 20, 1977, the District Court denied respondent Betar's motion to remand and granted petitioner's motion to dismiss for lack of personal jurisdiction. Thereafter, on January 30, 1978, the District Court denied respondent's motion to reconsider, but stayed its order of dismissal pending further discovery on the jurisdiction issue. Finally, on March 20, 1978, all discovery having been completed, the District Court entered its final order denying respondent's motion to remand and granting petitioner's motion to dismiss the action for lack of personal jurisdiction (App. 1a-4a).

Appeal

Respondent administrator appealed the District Court's dismissal order to the Court of Appeals for the Seventh Circuit. However, the Court of Appeals did not reach the merits of the dismissal order for lack of personal jurisdiction over DeHavilland Aircraft of Canada, Ltd. Instead, the Court of Appeals ruled that this action

between an Illinois administrator and a foreign corporation should not be in federal court, despite the language of 28 U.S.C. § 1332(a)(2), but should be remanded to state court. Specifically, the Court of Appeals ruled that the Illinois citizenship of plaintiff administrator was to be ignored in favor of the foreign citizenship of the beneficiaries of decedent's estate, thereby rendering the action one between foreign plaintiffs and foreign defendants and destroying federal jurisdiction. The District Court had ruled to the contrary that the Illinois citizenship of plaintiff-administrator was not to be ignored, stating that "the decision in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1963) controls" (80 F.R.D. at 401) (App. 2a). The Court of Appeals reversed (603 F. 2d at 30) impliedly holding that *Mecom*, although never overruled or even criticized by this Court, is no longer the law (App. 5a-14a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *MECOM V. FITZSIMMONS DRILLING CO.*

The Court of Appeals decision herein is in patent and direct conflict with this Court's holding in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

In *Mecom*, a wrongful death action was filed in the state court of Oklahoma by a Louisiana administrator (the Oklahoma statute like Illinois allowed the appointment of foreign administrators). The defendant, a Louisiana corporation, removed the case to federal court. Plaintiff moved to remand on the ground that diversity of citizenship was lacking, but the District Court denied the motion on the ground that the appointment of the Louisiana administrator had been done for the sole purpose of avoiding federal jurisdiction. The Court of Appeals affirmed, but the U.S. Supreme Court reversed and held that, regardless of motive, the administrator's citizenship was controlling in determining diversity jurisdiction. In the language of the Court (284 U.S. at 186):

> ". . . where an administrator is required to bring suit under a statute *giving a right to recover for death by wrongful act* and is, as here, *charged with the responsibility for the conduct for settlement of such suit* and the distribution of its proceeds to the persons entitled under statute, and is *liable upon his official bond for failure to act with diligence and fidelity*, he is the real party in interest and *his citizenship, rather than that of the beneficiaries, is determinative of Federal jurisdiction*. This we think is the correct view." (Emphasis added)

The *Mecom* Court stated further (at 189):

> "[I]t is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is *immaterial* upon the question of identity or diversity of citizenship." (Emphasis added)

The facts found determinative in *Mecom* are all present in the case at bar. Illinois law gives plaintiff administrator the exclusive "right to recover for death by wrongful act" (Ill. Rev. Stats., Ch. 70, § 2); charges plaintiff administrator "with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds" (Ill. Rev. Stats., Ch. 70, § 2); and requires a bond upon which plaintiff administrator is liable "for failure to act with diligence and fidelity" (Ill. Rev. Stats., Ch. 3, § 164, Ch. 110½, § 13-2). See *Harnetiaux' Estate v. Hartzell*, 91 Ill. App. 2d 222, 234 N.E. 2d 81 (1968), stating (at 227):

> "Under the terms of the wrongful death act [of Illinois] it is clearly provided that every action for wrongful death should be run in the name of the personal representative of the deceased person . . . . *The right to institute a wrongful death action and to settle the same is with the personal representative of the deceased and not with an heir.*" (Emphasis added)

There is no factual distinction between *Mecom* and the case at bar. All the rights, obligations and duties possessed by the Louisiana administrator in *Mecom* (and more) are possessed by the Illinois administrator in the instant case. Nor did the *Mecom* administrator have any more "actual stake in the outcome of the litigation" (603 F. 2d at 35) than the instant plaintiff. Indeed, the *Mecom* administrator was a Louisiana attorney who did not even know the decedent or his heirs (284 U.S. at 188).

II.

"SUBSEQUENT DEVELOPMENTS" IN THE LAW DO NOT SUPPORT THE COURT OF APPEALS' DISCARDING OF *MECOM*; IN ANY EVENT, THIS COURT'S GUIDANCE IS NEEDED ON THE RELATIONSHIP OF 28 U.S.C. § 1359 TO ADMINISTRATOR APPOINTMENTS.

Ironically, another panel of the Seventh Circuit Court of Appeals endorsed the *Mecom* rule in *First National Bank of Chicago v. Mottola*, 302 F. Supp. 785, 791 (N.D. Ill. 1969), *aff'd. sub nom., First National Bank of Chicago v. Ettlinger*, 465 F. 2d 343 (7th Cir. 1972). Nevertheless, the instant Court of Appeals acknowledged *Mecom*, but found it unpersuasive when considered "in its proper statutory context and in light of subsequent developments in the law" (603 F. 2d at 33). The "statutory context" referred to by the Court of Appeals is 28 U.S.C. § 1359 enacted in 1948 and providing:

> § 1359 Parties collusively joined or made
>
> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

In *Kramer v. Caribbean Mills*, 394 U.S. 23 (1969), this Court held that § 1359 applied (as did its statutory predecessors) to voluntary assignments of causes of action in an attempt to "manufacture federal jurisdiction" (394 U.S. at 829). However, this Court expressly left open the question of whether § 1359 has any application to the appointment of personal administrators and listed several reasons why it might not. The *Kramer* Court stated (394 U.S. at 828, fn. 9):

> "Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-

state representative "improper" or "collusive" See, *e.g., McSparran v. Weist,* 402 F. 2d 867 (1968); *Lang v. Elm City Constr. Co.,* 324 F. 2d 235 (1963); *County of Todd v. Loegering,* 297 F. 2d 470 (1961); cf. *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183 (1931). Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in the state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of § 1359."

Despite the *Kramer* Court's failure to approve the applicability of § 1359 to administrator appointments, some subsequent Court of Appeals decisions have applied § 1359 to administrator cases where the administrator was appointed for the sole purpose of manufacturing federal jurisdiction that would otherwise be lacking. See e.g., *McSparran v. Weist,* 402 F. 2d 867 (3d Cir. 1968); *Bishop v. Hendrix,* 495 F. 2d 289 (4th Cir. 1974); *Rogers v. Bates,* 431 F. 2d 16 (8th Cir. 1970); *Bass v. Texas Power & Light Co.,* 432 F. 2d 763 (5th Cir. 1970); *Lester v. McFaddon,* 415 F. 2d 1101 (4th Cir. 1969); *O'Brien v. AVCO Corporation,* 425 F. 2d 1030 (2d Cir. 1969).

Whether or not these cases are correct interpretations of § 1359 and a proper limitation of *Mecom* (an issue that in itself merits this Court's review), the instant case clearly deprives *Mecom* of any remaining vitality since here it is undisputed that there was absolutely no attempt (collusive or otherwise) to manufacture federal

jurisdiction by means of the Illinois administrator's appointment. Indeed, just the opposite is true. In the language of the Court of Appeals (603 F. 2d at 35):

> "It is quite clear, however, that the beneficiaries *did not appoint the personal representative for the purpose of creating diversity of citizenship.* Apparently Illinois offers the most convenient forum and the plaintiff was the most convenient administrator available. The motives for the appointment do not appear clearly in the record, but *most conspicuous is the lack of an apparent motive to manufacture jurisdiction.*" (Emphasis added)

In this context, it is clear that if *Mecom* does not apply to this case then it does not apply to any case. It is equally clear that the interplay between the *Mecom* decision and 28 U.S.C. § 1359 has generated confusing and conflicting results which, unless clarified by this Court, will undermine the "goal of uniformity of federal procedure", *Hanna v. Plumer,* 380 U.S. 460, 463 (1965) in diversity cases brought by administrators or other personal representatives.

CONCLUSION

To decide an important and recurring question of federal diversity jurisdiction challenging the vitality of a well-reasoned decision of this Court plainly applicable to the instant case, DeHavilland Aircraft Corporation respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMUEL J. BETAR,
Plaintiff,

No. 77 C 1912 vs.

DE HAVILLAND AIRCRAFT OF CANADA, LTD., *and*
DE HAVILLAND CANADA, INC.,
Defendants.

DECISION ON PLAINTIFF'S MOTION TO REMAND

Plaintiff has moved to remand this case to the Circuit Court of Cook County, Illinois from which it was removed by defendants. The plaintiff has joined in the motion of defendant De Havilland Canada, Inc., an Illinois corporation to dismiss, leaving the sole defendant as De Havilland Aircraft of Canada, Ltd., a Canadian corporation with its principal place of business in Downsview, Ontario.

Plaintiff contends that although Betar as Public Administrator is a citizen of Illinois, citizenship should be determined by the beneficiaries of the estate. This is based principally upon a statement in *Miller* v. *Perry*, 456 F.2d 63 at p. 68 (4th Cir. 1972). *Miller* was decided on the ground that an administrator under the law of North Carolina is a ministerial officer. His role is purely nomi-

nal and his presence in the case was primarily a device to avoid diversity jurisdiction.

The role of an administrator under Illinois law, however, is quite different. *Ill. Rev. Stat.* (1975) Ch. 3. Furthermore, under Ch. 70, §2, he is a necessary party to a death action in the absence of an executor.

We believe the decision in *Mecom* v. *FitzSimmons Drilling Co.*, 284 U.S. 183 (1931) controls. This suit is therefore one between an Illinois citizen and a foreign corporation. For that reason we have jurisdiction and should not remand this case to the Circuit Court of Cook County, Illinois.

Since we have diversity jurisdiction in this case, we now turn to the motion of defendant De Havilland Aircraft of Canada, Ltd. to dismiss for lack of jurisdiction over its person. Service on this defendant was attempted by serving an employee of De Havilland Canada, Inc., a Delaware corporation with its principal place of business in Rosemont, Illinois. The parent corporation is the sole stockholder of this subsidiary, and the subsidiary does nothing except sell the parent's products. Thus plaintiff contends that the subsidiary which has been served is nothing more than a branch office of the parent.

However, we think that the law is reasonably clear that a parent and its subsidiary often maintain their separate identities and, if they do, they must be individually served with process. In *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), the Supreme Court upheld dismissal for lack of jurisdiction over the defendant where service was made on a wholly owned subsidiary of the parent. The court found that so long as the two corporate identities were "not pure fiction," service on a

subsidiary did not constitute service on the parent which owned all of the stock. *id.* at 337. The maintenance of separate records, separate offices and a *bona fide* business purpose controlled.

Plaintiff has failed to show that these two separate corporations have failed to retain their separate identities. It has merely shown that they have common officers and a parent-subsidiary relationship. The local corporation, however, performs a different function from the parent, as is evidenced by the case at bar in which plaintiff has conceded that the parent has no responsibility for the crash which is the subject matter of this litigation.

Defendant cites *Lindley* v. *St. Louis-San Francisco Ry. Co.*, 407 F.2d 639 (7th Cir. 1968). However, that case involves §13.3 of the Illinois statute governing service on corporations (*Ill. Rev. Stat.* (1975) Ch. 110, §13.3), specifically the issue of transacting business in Illinois. This issue is not reached in the case at bar, since the subsidiary is admittedly doing business in Illinois but is not necessarily the alter-ego of the parent. Likewise in *Rymal* v. *Ulbeco, Inc.*, 33 Ill. App. 3d 799 (2d Dist. 1975) service was quashed under §13.3, although the court also indicated that substantial identity between the parent and subsidiary would justify service of process on one for the other. In that case, there was clearly separate identity between the two corporations, but the facts of the case illustrate the potential complexity which can be found in corporate structures. Service was made upon the subsidiary of a subsidiary in that case in an unsuccessful attempt to reach the parent. Certainly no general rule exists that service upon a wholly owned subsidiary can constitute service upon the parent.

In any event, so long as *Cannon* remains the law controlling this court, plaintiff has failed to show substantial identity between the two corporations in this case. Therefore, motion of defendant De Havilland Aircraft of Canada, Ltd. to dismiss for insufficiency of process is granted. F.R.C.P. 12(b)(4).

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: Oct. 20, 1977

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1911

SAMUEL J. BETAR, Public Administrator of Cook County, and Administrator of the Estate of Raghubir Dutt Law, deceased,

Plaintiff-Appellant,

v.

DE HAVILLAND AIRCRAFT OF CANADA, LTD., a Canadian Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 1912—**Thomas R. McMillen**, *Judge.*

ARGUED APRIL 5, 1979—DECIDED AUGUST 3, 1979

Before PELL and BAUER, *Circuit Judges*, and HOFFMAN, *Senior District Judge.**

PELL, *Circuit Judge.* The plaintiff, Samuel J. Betar, Public Administrator of Cook County and administrator of the estate of Raghubir Dutt Law, appeals from final orders in the district court denying his motion to remand this cause to the Circuit Court of Cook County, Illinois, and granting the motion of the defendant, De Havilland Aircraft of Canada, Ltd., (Ltd.), to dismiss for

* Senior District Judge Walter E. Hoffman of the Eastern District of Virginia is sitting by designation.

lack of personal jurisdiction. The plaintiff argues that the removal of this cause was improper because it is not within the original jurisdiction of the district court, as required by the removal statute, 28 U.S.C. § 1441(a). Specifically, the plaintiff argues that the district court improperly looked to the citizenship of the named fiduciary plaintiff instead of that of the statutory beneficiaries under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, § 1 *et seq.*, in determining that it had diversity jurisdiction. The plaintiff also challenges the district court's decision that it did not have personal jurisdiction over the defendant, but, in light of our disposition of the plaintiff's first argument, we do not reach this issue.

The decedent, Raghubir Dutt Law, an Indian national, was killed in 1976 when an airplane manufactured by the defendant crashed in Zambia, Central Africa. On April 27, 1977, the plaintiff was appointed administrator of the estate of the decedent. The record shows no assets in the estate other than the cause of action for wrongful death. On April 28, 1977, the plaintiff filed an action under the Illinois Wrongful Death Act in the Circuit Court of Cook County against the defendant, Ltd., and its subsidiary, De Havilland Canada, Inc., (Inc.), a Delaware corporation with offices in Rosemont, Illinois. On the same day, Crispin Maunder, a British subject injured in the same crash, filed an action in the same court against the same defendants. Ltd. petitioned for removal of both actions to the federal district court for the Northern District of Illinois. Removal was based on diversity of citizenship, Ltd. asserting that Inc. was a "sham" defendant. The plaintiffs joined in the motion to dismiss Inc., leaving Ltd. as the only defendant. Both plaintiffs moved to remand the action to the state court. The Maunder action was remanded on the ground that the court was without jurisdiction, the suit being between aliens: Maunder, a British subject, and Ltd., a Canadian corporation. Basing its determination on the citizenship of the personal representative in the Betar action, the district court concluded that there was diversity between the plaintiff, an Illinois citizen, and the defendant, and denied Betar's motion to remand. The

plaintiff, arguing for remand, contends that 28 U.S.C. § 1359 requires that the citizenship of the personal representative be disregarded and that the determination of jurisdiction be based on the citizenship of the Wrongful Death Act beneficiaries, the widow and children of Raghubir Dutt Law, all Indian nationals.

The general rule is that the citizenship of the real party in interest is determinative in deciding whether the district court has diversity jurisdiction.

> The citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism. It is based upon the principle that a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts.

C. Wright & A. Miller, Federal Practice & Procedure § 1556 at 711. Under Fed. R. Civ. P. 17(a) the plaintiff personal representative would be defined as the "real party in interest" in the sense that the action is properly maintained in his name, without need to join the beneficiaries. This rule, however, is merely procedural and does not extend or limit the subject matter jurisdiction of the district court. Fed. R. Civ. P. 82; *Lester v. McFaddon*, 415 F.2d 1101, 1105 & n.10 (4th Cir. 1969).

According to the defendant, however, the substantive rule for determining jurisdiction is identical, citing the decision of the Supreme Court in *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931). In *Mecom* the plaintiff was an administrator appointed by a state court under the state wrongful death act. The plaintiff-administrator and the defendant were citizens of the same state. The defendant nevertheless attempted to remove the action to federal court on the basis of diversity between the defendant and the statutory beneficiaries under the wrongful death act, arguing that the survivors appointed the administrator for the sole purpose of defeating federal jurisdiction. Noting that state law designated the administrator as named plaintiff in a wrongful death action, the Supreme Court held that the

federal court had no jurisdiction because the administrator and the defendant were citizens of the same state. According to the Court, it was "immaterial that the motive for obtaining his appointment and qualification was that he might thus . . . institute an action which could not be . . . removed on the ground of diversity of citizenship." 284 U.S. at 190. The defendant in the present action argues that *Mecom* establishes a universal rule directing that the citizenship of an administrator, lawfully appointed by the state court for bringing a wrongful death action, be considered in determining diversity of citizenship jurisdiction. Applying this rule, Betar, the Illinois personal representative, would be considered the real party in interest.

The defendant's reliance on *Mecom*, however, fails to consider the decision in its proper statutory context and in light of subsequent developments in the law. The effect of the appointment of the personal representative in this case, at least on a prima facie basis, was to create diversity jurisdiction. The effect of the device in *Mecom* was to defeat jurisdiction. Devices to create federal jurisdiction have historically been limited by statute; devices to defeat jurisdiction have not. *See Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 825-26 (1969). *See generally* Hart & Wechsler's The Federal Courts and the Federal System at 1100-01 (2d ed. 1973); 3A Moore's Federal Practice ¶17.05[2] at 17-40; C. Wright & A. Miller, Federal Practice & Procedure § 1558 (1971). Thus, the plaintiff's argument against the creation of jurisdiction in this case is aided by 28 U.S.C. § 1359, which says:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

The early treatment of court-appointed wrongful death fiduciaries under section 1359 is typified by the literal reading of the statute in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959). According to the *Corabi* rule, a device used to create jurisdiction fell within the prohibition of section 1359 only if the court

found an illegal agreement or understanding between opponents. The court interpreted *Mecom* as making a motive to secure jurisdiction immaterial and not subject to inquiry by the court in the absence of collusion. *See also McCoy v. Blakely*, 217 F.2d 227 (8th Cir. 1954) (appointment of fiduciary violates statute only if it perpetrates a fraud). *See generally* C. Wright & A. Miller, Federal Practice & Procedure § 1557 (1971). The Third Circuit, sitting *en banc*, overruled *Corabi* in 1968, however, holding that an appointment of a representative with only nominal duties, motivated by a desire to create federal jurisdiction, violated section 1359. *McSparren v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903.

The decision of the Supreme Court in *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969), decided shortly after *McSparren*, buttresses the ruling in that case. In *Kramer* the Supreme Court ruled that an assignment of a claim for the sole purpose of creating diversity jurisdiction, although legal under state law, was insufficient under section 1359 to create diversity jurisdiction. According to the Court in *Kramer*, section 1359 must be read consistently with its broad purpose:

> If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties.

394 U.S. at 828-29.[1] The Court in *Kramer* expressly reserved decision, however, as to the effect of section

[1] Although the defendant apparently has not made this argument, we do note that the type of diversity jurisdiction was not a factor in the *Kramer* decision. The diversity involved in *Kramer* was the same as the diversity involved here, based on the alienage of one of the parties. 28 U.S.C. § 1332(a)(2). The Court said:

> [B]y its terms, § 1359 applied equally to both types of diversity jurisdiction and there is no indication Congress intended to treat them differently.

394 U.S. at 829-30.

1359 on the appointment of representatives. The Court noted that the appointment of representatives varied in certain respects from assignments without deciding whether the variations were significant to the jurisdictional question. Briefly summarized, the suggested differences were: 1) state wrongful death laws typically require that a representative bring the suit; 2) the powers of representatives vary from state to state; and 3) the appointment of a representative is the result of a state court decree, not merely a private agreement.

Since the decision in *Kramer*, however, the Courts of Appeals have accorded little weight to these suggested distinctions and have followed the Third Circuit decision in *McSparren*. *E.g.*, *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971), *Rogers v. Bates*, 431 F.2d 16 (8th Cir. 1970); *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969). These decisions have applied section 1359 to defeat diversity jurisdiction based on the appointment of representatives with only nominal duties for the purpose of creating diversity of citizenship.[2]

[2] At least one decision applying *Kramer* has gone as far as to reject the *Mecom* rule when the effect of the citizenship of the representative is to *defeat* jurisdiction. *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972). In *Miller* the state wrongful death statute required appointment of a resident administrator as plaintiff. If the *Mecom* rule were read as a universal requirement, the effect of this state residency requirement would be to deny nonresidents a federal wrongful death forum against resident tortfeasors. The Fourth Circuit declined to hold the state residency requirement an unconstitutional state limitation of federal jurisdiction, reasoning instead that the *Mecom* rule was based on the assumption that the personal representative was clothed with such responsibilities and authority that he was the real party in interest in the action. Because the *Kramer* decision "injected a new note of realism into the determination of diversity jurisdiction . . .," the Fourth Circuit declined to use the citizenship of a nominal representative to defeat federal jurisdiction. The citizenship of the statutory beneficiaries was held to control.

Miller indicates that a state residency requirement is material when the effect of the requirement is improperly to defeat federal jurisdiction. The attempt by the defendant to

(Footnote continued on following page)

In *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969), for example, the Fourth Circuit minimized the differences alluded to in *Kramer* between assignment of a claim and appointment of a nominal representative. In *Lester* the beneficiaries under the state wrongful death statute, residents of South Carolina, appointed a Georgia representative to be named plaintiff for the sole purpose of creating diversity between the plaintiff and the defendant, a South Carolina citizen like the beneficiaries. The only duties of the representative were to lend his name to the suit and to disburse the proceeds to the statutory beneficiaries in the event of recovery. The court held that the citizenship of the beneficiaries controlled the jurisdictional issue. Comparing the case before it to *Kramer*, the court said that procuring the services of an out-of-state administrator for the purpose of creating diversity was as voluntary as the assignment in *Kramer*, regardless of the requirement of state law that some representative be appointed. Furthermore, disregarding the representative's citizenship for the purpose of determining jurisdiction did not constitute an attack on the state court appointment because the representative was still able to bring the action in his name pursuant to the state court order. The court finally examined the relationship of the parties to the action, concluding that the beneficiaries held the primary stake in the litigation, not the appointed representative, who was little more than a strawman. On this basis the court reasoned that the position of the parties was indistinguishable from that of the assignor and assignee in *Kramer* and held that jurisdiction was lacking under section 1359. *See also O'Brien v. AVCO Corporation*, 425 F.2d 1030, 1033-34 (2d Cir. 1969) (disregarding suggested differences

[2] *continued*
distinguish the present case because Illinois law has no such residency requirement is not persuasive, because at issue is a device to manufacture, not defeat, jurisdiction. Indeed, the potential for manipulation of diversity is greater when the choice of representative is unlimited. *Mecom* was applicable to the situation in *Miller*, and the issue was the extent to which the *Mecom* rule survived *Kramer*. The plaintiff here argues, however, and we agree, that *Mecom* is not even applicable.

between assignments and appointments for similar reasons).

There is virtually no difference between the duties of the personal representative appointed here and the duties of those whose appointment has been held inadequate by other Courts of Appeals to invoke jurisdiction. The Illinois Wrongful Death Act gives neither the personal representative nor the decedent's estate the right to share in the proceeds of the recovery. The representative's sole duty under the Act is to distribute the proceeds to the statutory beneficiaries in the event of recovery. Of course, the personal representative has a fiduciary duty requiring a bond to insure his acting with diligence and fidelity. *See* Ill. Rev. Stat. ch. 70, § 2, ch. 110½, § 13-2; *Harnetiaux' Estate v. Hartzell*, 91 Ill. App. 2d 222, 234 N.E.2d 81 (1968). Performance of this fiduciary duty of diligence is hardly a sufficient stake in the action to make the representative the real party in interest. We see no grounds for distinguishing between the personal representative under the Illinois Wrongful Death Act and the representative in *Lester v. McFaddon, supra. See also Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974), *cert. denied*, 419 U.S. 1056. *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972); *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969). *Cf. First National Bank of Chicago v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972) (executor appointed in will with active duties, including gathering assets in estate, paying debts and taxes of estate, collecting debts to estate, defending will and distributing property to beneficiaries); *Sadler v. New Hanover Memorial Hospital, Inc.*, 588 F.2d 914 (4th Cir. 1978) (executrix of active estate named in will). The statutory beneficiaries of this action are the widow and children of Raghubir Dutt Law, and they are the only parties that have an actual stake in the outcome of the litigation. Thus, in substance, this action is a suit between aliens.

It is quite clear, however, that the beneficiaries did not appoint the personal representative for the purpose of creating diversity of citizenship. Apparently Illinois offers the most convenient forum and the plaintiff was the most convenient administrator available. The

motives for the appointment do not appear clearly in the record, but most conspicuous is the lack of an apparent motive to manufacture jurisdiction. Although this motivation typically has been a factor in the decisions applying section 1359, *see, e.g., Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970); *O'Brien, supra; McSparren, supra*, we do not consider it indispensable to a holding of improper party making or joinder under section 1359. The purpose of section 1359 is to limit consideration to cases that "really and substantially" involve a dispute within the jurisdiction of the federal courts. *See Bishop, supra*, 495 F.2d at 294; *O'Brien, supra*, 425 F.2d at 1032. Because the named plaintiff here has no stake in the outcome of the lawsuit, the use of his citizenship transforms an action between aliens to an action within the diversity jurisdiction. The purpose of diversity jurisdiction to prevent local prejudice, and the salutary purposes of section 1359 are not served by assuming jurisdiction of this action, just as they would not be served by assuming jurisdiction in the more common situation involving a motive to manufacture jurisdiction by the appointment. The reason for appointing the representative here is insufficient to establish more than a nominal relationship between the representative and the cause. *Bishop, supra* (remanding under § 1359 although administrator appointed for experience in business affairs); *Vaughan v. Southern Ry.*, 542 F.2d 641 (4th Cir. 1976) (remanding under § 1359 although purpose of bringing suit in North Carolina with required resident representative was to locate litigation close to witnesses and scene of accident).

Thus it is clear that the beneficiaries could not have used the citizenship of this administrator to invoke federal diversity jurisdiction. It is equally clear that the defendants, motivated by a desire to invoke diversity jurisdiction, cannot base removal on the citizenship of the representative. In the absence of a specific statutory exception, removal is proper only if the federal court would have had jurisdiction over the action as it was originally filed by the plaintiff. 28 U.S.C. § 1441(a); *In re Dunn*, 212 U.S. 374, 384 (1909); *Snow v. Ford Motor Co.*, 561 F.2d 787, 789 (9th Cir. 1977). *See Mullins v.*

Seals, 562 F.2d 326 (4th Cir. 1977) (remanding wrongful death action to state court after removal by defendant based on diversity between personal representative and defendant).

Accordingly, the judgment of the district court is reversed and the cause is remanded to the district court with directions to remand the cause to the state court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1979.

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. WALTER E. HOFFMAN, *Senior District Judge**

SAMUEL J. BETAR, Public Administrator of Cook County, and Administrator of the Estate of Raghubir Dutt Law, deceased,

Plaintiff-Appellant,

No. 78-1911 vs.

DE HAVILLAND AIRCRAFT OF CANADA, LTD., a Canadian Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 1912
THOMAS R. MCMILLEN, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by De Havilland Aircraft of Canada, Ltd., a Canadian Corporation, defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Walter E. Hoffman, Senior District Judge from the Eastern District of Virginia, is sitting by designation.